Supreme Court, U.S.
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No. 92-136

In The

Supreme Court of the United States

October Term, 1992

DR. JAMES T. McGIBONY, JAMES F. COY, M.D., et al.,

Petitioners,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, et al.,

Respondents.

Petition For Writ Of Certiorari To The Florida Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondents do not agree with petitioners' characterization of the question presented for review. Instead, it is respondents' position that the following question would be presented for review before this court:

> DO THOSE SECTIONS OF § 766.314, FLA. STAT., PROVIDING FOR THE ASSESSMENT OF ALL FLORIDA LICENSED PHYSICIANS NOT DIRECTLY PARTICIPATING IN THE PLAN, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF FLORIDA

Respondents accept the list of parties to the proceedings in the Supreme Court of Florida as delineated by the petitioners.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF FLORIDA	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
WHY THE WRIT SHOULD BE DENIED	3
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed. 2d 149 (1984) 3

Easter Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984) 2, 3, 4, 8

STATUTES

Chapter 458 6

Chapter 459 6

§766.314(4), Fla. Stat. 6

§766.314(4)(a), Fla. Stat. 6

§766.314(5)(b) 6

§766.314(7)(a) 6

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OPINIONS BELOW

Respondents accept the recitation by petitioners of the opinions rendered below and the cites thereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Respondents accept petitioners' statement as to the grounds on which the jurisdiction of this court is invoked.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondents accept the recitation by the petitioners of the statutory and constitutional provisions involved.

STATEMENT OF THE CASE

Respondents accept the statement of the case as set forth by the petitioners, except as clarified and/or modified herein.

The assessment statutes in question were challenged in the trial court as violating the petitioners' rights under the equal protection clauses of the United States and Florida Constitutions. The trial court, while affirming the constitutionality of the challenged statutes under the equal protection clauses of both the United States and Florida Constitutions, did not discuss, in detail, the federal equal protection constitutional issue. (Petitioners' Appendix, Pages A-25-A-53). Instead, the constitutionality of the challenged statutes was upheld primarily upon the rationale espoused by the Florida Supreme Court in *Easter Airlines, Inc. v. Department of Revenue,* 455 So.2d 311 (Fla. 1984). The Florida First District Court of Appeal, (the intermediary appellate court in Florida), affirmed the decision of the trial court. Again, the District Court of Appeal did not discuss at all the federal constitutional equal protection issues, but instead affirmed the trial court's decision based upon the rationale of the Florida Supreme Court in *Eastern Airlines, Inc., v. Department of Revenue,* supra. In addition, the decision of the trial court was upheld because of the Florida Supreme

Court's holding in *Department of Insurance v. Southeast Volusia Hospital District*, 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed. 2d 149 (1984). (Petitioners' Appendix, pages A-17-A-24).

The Supreme Court of Florida upheld the constitutionality of the challenged statutes on the basis of the court's decision in *Eastern Airlines, Inc. v. Department of Revenue*, supra, by declaring and reaffirming that in determining whether a tax statute in Florida violates the equal protection clause of the Florida Constitution, Florida follows a "rational basis" standard for weighing the constitutional challenge. The court specifically found that the challenged statutes did not violate the equal protection clause of the Florida Constitution (Article I, Section 2). The court did not rule on the constitutionality of the statute under the equal protection clause of the United States Constitution, although the Florida Supreme Court relied upon rulings of the United States Supreme Court in rendering its decision in *Eastern Airlines, Inc. v. Department of Revenue*, supra.

WHY THE WRIT SHOULD BE DENIED

It is the petitioners' position that this court should accept this case for review and issue its writ of certiorari because the Florida appellate courts have decided an important question of federal constitutional law that has not been decided or settled by this court, namely whether the equal protection clause of the Fourteenth Amendment of the United States Constitution is violated by the imposition of a "status tax." It is the petitioners' position that

the Florida Supreme Court decision allows the State of Florida to tax a person's status in life without a proper reason. Such is not the effect of nor the decision of the Florida Supreme Court.

The Florida Supreme Court carefully considered the petitioners' argument challenging the constitutionality of the subject assessment statutes, but found that the assessments against the non-participating physicians constitute a "tax" within the meaning of Florida law and that the challenged statutes met the standard for tax statutes established in *Eastern Airlines, Inc. v. Department of Revenue,* supra.

The Florida Supreme Court set out the test established in the *Eastern Airlines* case for gauging the validity of a taxing statute and determined that the test as set forth in the *Eastern Airlines* case provides for the "rational basis" standard for weighing claims that a statute violates the equal protection clause of the Florida Constitution. Applying the rational basis test to this case, the Florida Supreme Court concluded that there was a rational basis for the statutory assessment of all physicians even though these physicians do not practice obstetrics. The court recited verbatim from the comprehensive findings of fact of the trial court that all physicians play a critical role in the delivery of health care services and that all physicians were adversely affected by the medical malpractice crisis in Florida which had engulfed the State of Florida and had severely disrupted the delivery of health care services and the day and day operations of hospitals throughout the State. The trial court had found that the effects of the disruption of obstetrical services was particularly severe. The court recited further the findings of the

trial court that when obstetrical services are disrupted, the emergency room of hospitals is overloaded and "the system is pushed to the wall." The final conclusion was that the disruption of obstetrical services would be disastrous to the operation of hospitals in Florida.

The Florida Supreme Court concluded that there was competent substantial evidence to support the trial court's findings and specifically the finding that:

> "Conversely, when the malpractice crisis is lessened and health care services can be delivered smoothly and efficiently, benefits will be seen and felt throughout the health care industry."

The Florida Supreme Court recognized that health care services are delivered by a team of providers, all of who interact and depend upon one another, and that a breakdown in one area of service impacts the other areas. Accordingly, the Florida Supreme Court concluded that all physicians, regardless of whether they practice obstetrics, derived a benefit from the subject legislation that is greater in degree than that derived by the general public. The court further recognized that while the benefits accruing to nonobstetrical physicians was obviously less than those obtained by obstetricians, the Florida legislature had recognized this lessened benefit by assessing the nonparticipating physicians only $250.00 as compared to the $5,000.00 assessment to participating physicians. Accordingly, the court concluded that the Florida Legislature had a rationale basis for having enacted the subject assessment statutes and that the subject classification was not palpably arbitrary.

Further, the $250.00 assessment against non-participating physicians was but one source of funding of the Florida Birth-Related Neurological Injury Compensation Plan. Instead, the Plan was funded in the following manner:

(1). A $250.00 annual base assessment against all physicians licensed pursuant to Chapter 458 or Chapter 459, Florida Statutes, other than participating physicians. (§766.314(4), Fla. Stat.)

(2). A $5,000.00 annual base assessment against all participating physicians. (§766.314(4), Fla. Stat.)

(3). An annual base assessment against hospitals equal to $50.00 per infant delivered at the hospital. (§766.314(4)(a), Fla. Stat.)

(4). A $20,000,000.00 appropriation from the Insurance Commissioner's Regulatory Trust Fund, which was immediately paid to the Plan upon enactment of the subject statutes.

(5). Thereafter, if after taking into consideration the aforestated initial assessments, it was determined by the Florida Department of Insurance that such funds were insufficient to maintain the Plan on an actuarially sound basis, the Florida Legislature was mandated to appropriate for transfer to the Plan, an additional amount of up to $20,000,000.00, for a total appropriation of $40,000,000.00 (§766.314(5)(b), Fla. Stat.)

(6). Beginning January 1, 1990, an assessment against each entity licensed to issued casualty insurance in Florida pursuant to the specific formula specified in §766.314(7)(a), Fla. Stat.

Accordingly, the Plan was being funded not only by physicians who were directly affected by the medical malpractice crisis in Florida, but by other related classes which were also directly affected by the crisis, including a substantial appropriation by the Florida Legislature.

Pursuant to Rule 10, Supreme Court Rules, it is provided in pertinent part:

> ".1. A review on writ of certiorari is not a matter of right, but of judicial discretion. *A petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor.* The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons that will be considered: . . .
>
> * * *
>
> (b). When a State court of last resort has decided a federal question in a way that conflicts with the decision of another State court of last resort or of a United States Court of Appeals.
>
> (c). When a State Court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court."

In this case, the Florida Supreme Court, the Florida court of last resort, has not decided a federal question that conflicts with the decision of another State court of last resort or of the United States Court of Appeals, nor have the petitioners contended that such conflict exists.

Likewise, it cannot be said that the Florida Supreme Court has decided an important question of federal law which has not been, but should be, settled by the United States Supreme Court, nor has the Florida Supreme Court decided a federal question in a way that conflicts with the applicable decisions of the United States Supreme Court. Petitioners have not maintained that the Florida Supreme Court's decision decided a federal question in a way that conflicts with applicable decisions of this court. Instead, petitioners concede, and the Florida Supreme Court decision so reveals, that the Florida Supreme Court did not decide a federal question and, indeed, did not decide an important question of federal law in that the Florida Supreme Court did not even determine the constitutionality of the subject statute under the equal protection clause of the United States Constitution. Instead, all the Florida Supreme Court has done is make a determination that a tax statute enacted by the Florida Legislature did not violate the equal protection clause of the Florida constitution based upon the rationale delineated in *Eastern Airlines, Inc. v. Department of Revenue*, supra, which decision was based upon several United States Supreme Court decisions.

Accordingly, when it is recognized that the Florida Supreme Court merely declared a tax statute enacted by the Florida Legislature as not being in violation of the equal protection clause of the Florida Constitution based upon a previously decided Florida Supreme Court decision, which decision had been formulated by the use of several United States Supreme Court decisions, and did not decide a federal question nor specifically rule on the

constitutionality of a State statute under the equal protection clause of the United States Constitution, it cannot be maintained that there are special and important reasons for this court to review the final decision of the court of last resort in the State of Florida.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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